Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

DILLARD DEPARTMENT STORES, INC. AND
DILLARD'S NEVADA, INC.,

Petitioners,

v.

DELORES BECKWITH,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Nevada

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a standard of review that upholds a punitive damages award against a corporate defendant unless the award, when compared to the defendant's "nationwide worth," would "financially destroy or annihilate" the defendant violates the constitutional requirements enunciated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

PARTIES INVOLVED AND RULE 29.6 STATEMENT

All parties below are named in the caption. Dillard Department Stores, Inc. is now incorporated under the name Dillard's, Inc., and has no parent company. Dillard's Nevada, Inc. is wholly owned by Dillard's, Inc. Prudential Insurance Company of America owns a 10.33 percent equity interest in Dillard's, Inc. Capital Research & Management Company owns a 10.3 percent equity interest in Dillard's, Inc. Dillard's, Inc. does not own more than 10% of any other publicly-traded company.

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Petitioners Dillard Department Stores, Inc. and Dillard's Nevada, Inc. (collectively "Dillard") respectfully petition this Court for a writ of certiorari to review a decision of the Supreme Court of Nevada.

OPINIONS AND ORDERS BELOW

The opinion of the Nevada Supreme Court (App., *infra*, 1a-12a), is reported at 989 P.2d 882. That court's order denying rehearing (*id.* at 20a) is not reported. The judgment and post-verdict order of the trial court (*id.* at 13a-19a) are not reported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on December 13, 1999. That court denied rehearing on February 22, 2000. This petition is being timely filed within 90 days of that date. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part, "[N]or shall any State deprive any person of . . . property, without due process of law." U.S. CONST. AMEND. XIV, § 1.

2. The Commerce Clause provides, in pertinent part: "The Congress shall have the Power . . . To regulate Commerce . . . among the several States." U.S. CONST. ART I, § 8, cl. 3.

STATEMENT OF THE CASE

This case demonstrates that, absent this Court's intervention, the misuse by many courts of corporate defendants' wealth to justify otherwise excessive, multimillion-dollar punitive exactions threatens to render the promise of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), entirely meaningless. The punitive damages trial in this case was in truth a trial about Dillard's size, wealth, and out-of-state residency. The record of that proceeding is permeated with emotional entreaties to the jury to punish—or, in the oft-repeated words of petitioner's counsel, "pound"—Dillard for its nationwide worth and its status as a large, out-of-state corporation. 9/29/99 Tr. 80, 84. Indeed, almost *half* of that record is dedicated to the number, style, and use by Dillard and its executives of corporate jets. *E.g.*, *id.* at 31-42, 52-57, 66-67. The remainder of the record is replete with lengthy and inflammatory argument concerning the value of Dillard's aggregate assets and net worth, and with a literal laundry list of numerous large, well-known companies that rank below Dillard on the "Fortune 500" ranking. *E.g.*, *id.* at 59-63.

Rather than provide a meaningful constraint on such biased and unchecked jury discretion as required by this Court's cases, the Nevada Supreme Court affirmed the trial court's $1.8 million punitive damages award based solely on Dillard's nationwide financial status, without *any* attempt to justify the award under the constitutional standards this Court annunciated in *BMW*. Most significantly, the court

below utterly ignored both this Court's refusal in *BMW* to include the defendant's wealth in the constitutional analysis and its strong admonition against extraterritorial punishment.

Indeed, the Nevada Supreme Court did not even cite or refer to this Court's *BMW* decision in upholding the punitive award, despite Dillard's repeated argument that the award violated *BMW*'s constitutional standards. *See* Appellant's Opening Br. 22-23; Appellant's Reply Br. 15-16. Instead, in direct contradiction of this Court's precedent, the Nevada Supreme Court held that, because of the "subjective" nature of punitive awards, no "workable standards" exist "by which to evaluate the propriety of such an award." App, *infra*, 9a-10a. The court therefore held that a reviewing court *must* uphold a punitive award "unless . . . the amount awarded by the jury would financially destroy or annihilate the defendant" when compared to its "nationwide worth." *Id.*

While the decision below is an egregious example of the way in which lower federal and state courts have failed to follow this Court's decision in *BMW*, it is by no means an isolated one. Although some courts have faithfully applied *BMW* by refusing to use the defendant's wealth to inflate or dictate the punishment, many others have taken the same misguided approach as the Nevada Supreme Court below, and have allowed the overall wealth of a corporate defendant to either defeat or avoid altogether *BMW*'s due process "guideposts," leading to arbitrary, unpredictable and irrational punishments and frustrating *BMW*'s command that States provide advance notice of the maximum penalty that may be imposed for particular conduct.

Certiorari should therefore be granted to resolve the conflicts and confusion among state and federal courts about the relevance of a corporate defendant's wealth and other financial status in the *BMW* framework, and to make clear that this Court's omission of such wealth considerations from the *BMW* guideposts was intentional. The Nevada Supreme Court's blatant refusal to follow *BMW*, or even to apply any meaningful review of punitive damages awards, provides an appropriate and compelling vehicle for the Court to decide these issues.

A. Factual Background

Respondent Deloris Beckwith was an employee of a Dillard's department store in Las Vegas, Nevada, where she worked as an area sales manager. In 1996, Beckwith suffered a work-related back injury and, thereafter, filed a claim for workers compensation. *See* App., *infra*, 2a. Because of her injury, Beckwith was temporarily rendered unable to work. *Id.* At the time of this injury, Beckwith had recently returned to work following an extended absence due to a non-work related injury to her knee. 1 AA 137-38.[1]

While Beckwith was home with her back injury, a Dillard store manager requested that Beckwith return to work—in light of the Dillard store's needs and Beckwith's previous absence from work. *See* App., *infra*, 2a. After Beckwith declined to return to work, Dillard hired another person to fill her position as sales manager of the Dillard store. *Id.* The store manager later informed Beckwith that she had been replaced as manager. *Id.*

Approximately one month after her back injury, Beckwith returned to work. App., *infra*, 2a. Because she had been replaced as area sales manager, Beckwith returned to work in an entry-level sales associate position, at a reduced salary. *Id.* Beckwith worked at this entry-level position for a short period of time before quitting. *Id.* After her departure from Dillard, Beckwith failed to obtain comparable employment. *Id.*

B. Trial Court Proceedings

1. On October 1, 1996, Beckwith filed suit against Dillard in the Eighth Judicial District Court of Nevada, asserting, *inter alia*, claims for tortious discharge and intentional infliction of emotional distress. Although not evident until the eve of trial, Beckwith's tortious discharge claim was premised on the theory that her discharge violated the public

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[1] Cites to "AA" refer to the Appellant's Appendix, submitted by Dillard on appeal to the Nevada Supreme Court.

policy contained in NEV. REV. STAT. § 616C.530, which describes a workers' compensation insurer's duties in returning injured employees to work, but which expressly precludes suits based on violations of those duties. *See* 1 AA 1, 113, 115, 125.

The liability phase of the bifurcated trial began on August 26, 1997. On September 15, 1997, Dillard moved for a directed verdict asserting, among other things, Beckwith's misstatement of the requirements of NEV. REV. STAT. § 616C.530. On the same date, the district court not only denied this motion, but also ruled as a matter of law that NEV. REV. STAT. § 616C.530 had been violated. 1 AA 234, 235. The next day, however, the Court withdrew this latter ruling. 1 AA 236-37.

On September 17, 1997, the jury returned a verdict against Dillard for $424,028.00 in compensatory damages on Beckwith's claim of tortious constructive discharge in violation of public policy and an additional $200,000.00 in compensatory damages on her claim of intentional infliction of emotional distress. 2 AA 338-39. The jury also ruled that Dillard was liable for punitive damages. 2 AA 339.

2. Prior to the commencement of the punitive damages phase of the trial, on September 23, 1997, Dillard filed a motion *in limine* to exclude, among other things, any evidence of Dillard's financial condition or net worth existing outside the state of Nevada, relying in part on this Court's decision in *BMW*.[2]

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[2] Dillard's previous motion *in limine*, filed on June 13, 1997, had sought, in part, to exclude all evidence of Dillard's financial condition or worth from the first phase of the trial. *See* 1 AA 86, 90. On September 3, 1997, the district court had granted in part and denied in part Dillard's motion, ruling that such financial evidence would be admissible if a "jury verdict comes in for punitive damages." 1 AA 174, 175.

Before the punitive damages trial began, on September 29, 1997, the Court denied Dillard's motion. 2 AA 340-41. The district court ruled that, in awarding punitive damages, the jury could consider the income and worth of not only the Dillard stores in Nevada, but also Dillard's nationwide holdings. 2 AA 341 (citing *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 763 P.2d 673 (1988)). The district court's ruling was based on Nevada's "financial annihilation" standard for assessing punitive damages awards. Under this standard, any award of punitive damages must be upheld unless it would "financially destroy or annihilate" the defendant. App., *infra*, at 10a.

The district court also refused Dillard's proposed jury instructions limiting the jury's consideration to Dillard's assets in Nevada. 2 AA 354-65. Prior to the punitive phase of the trial, Dillard had requested the following instruction:

> You may consider the Defendant's assets in the State of Nevada in determining the amount of punitive damages to award Plaintiff, however, the function of punitive damages is not served by an award which, in light of the Defendant's wealth and gravity of the particular act, exceeds the level necessary to properly punish and deter the Defendant.

2 AA 352. Dillard also requested the following instruction:

> In considering the amount of punitive damages, you should not consider out-of-state conduct and harm. Punitive damages cannot be based on Dillard's conduct outside the State of Nevada and its impact on non-residents. You should consider only the interest of the State of Nevada in protecting its own citizens.

2 AA 348. The district court, however, denied these proposals and instead instructed the jury:

> In considering Dillards' financial condition, you may consider its net worth, that is, its gross assets

> minus liabilities, actual and contingent. You may also consider its net income which means after tax income.

2 AA 363; *see also* 9/29/97 Tr. 20-23.

The punitive phase of the trial, which commenced on September 29, 1997, was marked by Beckwith's attorney's singular focus on Dillard's wealth and status as a large, out-of-state corporation. The only documentary evidence submitted by Beckwith was Dillard's annual reports and financial statements and the April 28, 1997 edition of the "Fortune 500." 9/29/97 Tr. 26.

The only witness called by Beckwith was Bernard Goldstein, the President of Dillard's Phoenix Division. Beckwith's questioning focused entirely on Dillard's size and wealth. Indeed, fully half of Beckwith's attorney's direct examination of Mr. Goldstein involved how many "corporate jets" Dillard owned, what they were like, and how they were used. 9/29/97 Tr. 31-36. Similarly, Beckwith's attorney's cross-examination of Dillard's only witness, Steven Kirk Nelson, focused on the number and types of "corporate jets" owned by Dillard and its executives. *Id.* at 52-54.

At closing argument, Beckwith's attorney's continued to focus entirely on Dillard's wealth, size, and status as an out-of-state corporation. The first half of the argument centered on Dillard's ranking in the "Fortune 500," and on informing the jury—over Dillard's objection—that Dillard was a larger company that Tyson Foods, Transamerica, Ralston Purina, Union Carbide, W.R. Grace, Quaker Oats, and numerous other large, well-known companies. 9/29/97 Tr. 59-63. Beckwith's attorney then turned to Dillard's financial statements, leading the jury through how many divisions Dillard had, where they were throughout the country, Dillard's sales, its profits, and general net worth. Throughout his argument, Beckwith's counsel repeatedly referred to Dillard and its assets as "huge," "enormous," and "giant." *E.g.*, *id.* at 63, 67. After belaboring the number of stores owned by Dillard in a variety of different States, for example, Beckwith's counsel

pronounced Dillard "a juggernaut on the sea of commerce. It is enormous. Its financial assets are huge." *Id.* at 63.

Beckwith's attorney returned again and again to the subject that was his focus throughout the earlier testimony: Dillard's "corporate jets." He gratuitously referred to William Dillard as "the 82 year old Chairman, who is flying all over the country, even to this day, still working on one of those big private jets" (9/29/97 Tr. 66), and he described the purported failure of Dillard's executives or board members to be in attendance at the trial:

> You can look in vein [sic] in this courtroom and you are not going to see one of these folks. That's their board of directors right there. You are not going to see a one of them. Where are they? Where are they? Can you tell me why they, with all of those corporate jets and the money to run them, didn't get one of these fellows or this lady here, Mr. Dillard's daughter, to come in and say, you know something, we were wrong and, Deloris, we're sorry to you and we apologize.

9/29/97 Tr. 67-68.

Beckwith's attorney then asked the jury to teach Dillard "an extremely strong lesson" and get the attention of Dillard's executives and lawyers who, according to Beckwith's attorney, were in Texas and Arkansas. 9/29/97 Tr. 69. He repeatedly pleaded with the jury to "pound" Dillard. *Id.* at 80, 84.

After only a few hours of deliberation, the jury returned a verdict against Dillard, imposing $2,800,000.00 in punitive damages for Beckwith's claim for tortious discharge and an additional $1,400,000.00 in punitive damages for Beckwith's claim of intentional infliction of emotional distress.

3. On October 9, 1997, Dillard filed a Motion for Judgment Notwithstanding the Verdict. 2 AA 366-455. Among other things, Dillard requested that the district court reduce the awards of punitive damages pursuant to NEV. REV. STAT. § 42.005, which limits punitive damages to three times compensatory damages where compensatory damages are $100,000 or more. *Id.* On October 30, 1997, the district

court granted Dillard's motion, to the extent that the court reduced the award of punitive damages pursuant to NEV. REV. STAT. § 45.005. 2 AA 459, 460. The district court upheld the jury's verdict in all other respects.

Accordingly, the ultimate awards of punitive damages were $1,272,084.00 on Beckwith's claim for tortious discharge (reduced from $2,800,000.00) and $600,000.00 on the emotional distress claim (reduced from $1,400,000.00). The district court also awarded Beckwith $518,455.00 in attorneys' fees, and $44,670.68 in taxable costs. 2 AA 466-68.

C. Nevada Supreme Court Proceedings

Dillard appealed to the Nevada Supreme Court arguing, *inter alia*, that the remaining punitive award was unconstitutionally excessive because it was predicated on Dillard's aggregate nationwide wealth and out-of-state activities. Appellant's Opening Br. 22-23. Specifically, Dillard contended that the plaintiff's repeated and improper reliance on Dillard's overall wealth and assets "inflam[ed] the jury" and violated *BMW*'s constitutional guarantees. *Id.* at 22.

On December 13, 1999, the Nevada Supreme Court issued its opinion affirming the trial court's judgment. In rejecting Dillard's arguments, the Nevada Supreme Court relied upon its previous, pre-*BMW* ruling in *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 593, 763 P.2d 673, 677 (1988) (holding that a defendant's wealth is "directly relevant to the size of [a punitive damage] award"). App., *infra*, 9a. In addition, the Nevada Supreme Court ruled that the punitive award was not excessive, because the award "will not financially destroy or annihilate Dillard." App., *infra*, 10a. In reaching this ruling, the Nevada Supreme Court did not cite this Court's *BMW* ruling. *Id.*

Dillard timely filed a petition for rehearing, which the Nevada Supreme Court denied on February 22, 2000. App., *infra*, 20a.

REASONS FOR GRANTING THE WRIT

The problem of arbitrary, capricious and grossly excessive punitive damages awards has not abated since this Court's decision in *BMW*. Massive punitive damages judg-

ments continue to be inflicted across the country in a broad spectrum of cases, especially in cases like this one involving large out-of-state corporate defendants that do business throughout the Nation. *See, e.g.*, *Anderson v. General Motors Corp.*, No. BC116926 (Cal. Super. Ct., Los Angeles County Aug. 26, 1999) ($4.8 billion punitive damages jury verdict in automobile design defect case subsequently reduced to $1.09 billion); *Jimenez v. Chrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999) (upholding $250 million in punitive damages in automobile design defect case); *Romo v. Ford Motor Company*, No. 82318 (Cal. Super Ct., Stanislaus County July 12, 1999) ($290 million punitive damages verdict in automobile design defect case subsequently overturned on grounds of jury misconduct).

Many lower courts have continued to uphold such excessive awards on grounds that are entirely inconsistent with this Court's *BMW* decision. As this case demonstrates, for example, lower courts routinely evade the objective factors set forth in *BMW*, and instead rely on a factor rejected in *BMW*—the defendant's nationwide wealth, profits, and costs—as a basis for upholding huge punishments, thereby punishing the corporate defendant for its lawful conduct in other jurisdictions and nullifying any possibility of meaningful judicial review under the three *BMW* guideposts.

This Court's review is necessary to resolve the conflicts and confusion that have arisen since *BMW* on these issues, and to ensure that the *BMW* guideposts continue to have meaningful effect.

The Court Should Grant Certiorari To Make Clear That A Defendant's Aggregate Wealth And Financial Status Are Irrelevant To The Constitutional Factors Announced In *BMW*

A. The Decision Below Directly Conflicts With *BMW* And Other Decisions Of This Court

In *BMW*, this Court held that when a punitive damages award is "grossly excessive" in relationship to a State's "legitimate interests" in punishment and deterrence it "enter[s] the zone of arbitrariness that violates the Due Process Clause

of the Fourteenth Amendment." 517 U.S. at 568. The Court explained that a State has no legitimate interest in punishing conduct that took place outside the State's borders, that was "lawful where it occurred" and that "had no impact" on the State seeking to impose the punishment. *Id.* at 572-73. Under the federal due process inquiry into excessiveness, therefore, a punitive damages award must be analyzed without regard to such out-of-state conduct, "with consideration given only to the interests of [the citizens of the State seeking to impose the punishment], rather than those of the entire Nation." *Id.* at 574.

As part of its excessiveness analysis, the Court further announced that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574. To determine whether a particular defendant had fair notice of the magnitude of the punitive award—and thereby to determine if the award is "grossly excessive"—this Court articulated "[t]hree guideposts": (1) the "degree of reprehensibility" of the defendant's conduct (*id.* at 575); (2) the ratio between the punitive damages award and "actual harm inflicted on the plaintiff" (*id.* at 580); and (3) the relationship between the punitive damages award and "the civil or criminal penalties that could be imposed for comparable misconduct" (*id.* at 583).

Notably, the respondent-plaintiff in *BMW* argued that the aggregate wealth of the petitioner-defendant should be part of the constitutional calculus and warranted upholding the $2 million award in that case under the Due Process Clause. *See* Br. of Respondent at 39, *BMW of North America v. Gore*, No. 94-896 ("The award is also constitutionally justified by reference to BMW's wealth. The evidence showed that even 'the $4 million judgment would not have a substantial impact' on BMW's financial position."). But this Court rejected that argument, declining to adopt the defendant's wealth as a due process guidepost and declaring: "The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the

conduct of its business. Indeed, [a corporation's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on the interstate commerce." 517 U.S. at 585.

Justice Breyer, in his concurring opinion, added that, although Alabama permitted the courts to look to the "'financial position' of the defendant" as one of many factors in deciding whether an award was excessive under state law, "[t]his factor . . . is not necessarily intended to act as a significant *constraint* on punitive awards. Rather, *it provides an open-ended basis for inflating awards when the defendant is wealthy*." *Id.* at 591 (Breyer, J., concurring) (second emphasis added).

The decision below, by justifying the punitive award in this case based *solely* on Dillard's "nationwide worth," without any inquiry whatsoever into the necessary due process guideposts, is flatly inconsistent with *BMW*. The Nevada Supreme Court utterly disregarded the *BMW* analysis, despite Dillard's repeated arguments that the award violated the constitutional principles announced in *BMW*. Indeed, the Nevada Supreme Court eschewed *any* meaningful review of punitive damages awards:

> Heretofore, we have recognized the subjective nature of punitive damages and *the absence of workable standards by which to evaluate the propriety of such an award*. Accordingly, we have allowed that determination to rest with the discretion of the trier of the fact unless the evidence introduced at trial shows that the amount awarded by the jury would financially destroy or annihilate the defendant in which event we would attempt an appropriate adjustment of the award.

App., *infra*, 10a (emphasis added; citations omitted) (quoting *Hale v. Riverboat Casino, Inc.*, 100 Nev. 299, 306, 682 P.2d 190, 194 (1984)).

The Nevada Supreme Court's wholesale abdication of its constitutional responsibility to provide meaningful review of punitive damages awards flies in the face of this Court's cases. In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994),

for example, this Court held that precisely because "[p]unitive damages pose an acute danger of arbitrary deprivation of property"—a problem the Court warned was "aggravated" by the "rise of large, interstate and multinational corporations"—the decision as to the proper amount of punitive damages cannot constitutionally be "committed to the unreviewable discretion of the jury." *Id.* at 431-35; *see also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 455 (1993) (rejecting standard of review for punitive awards under which "*any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable"); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring) (standard that merely tells jury to "take into account the character of the defendants, their financial standing, and the nature of their acts" in awarding punitive damages is "scarcely better than no guidance at all"); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring) ("the Court should scrutinize carefully the procedures under which punitive damages are awarded in civil lawsuits").

Similarly, this Court upheld Alabama's procedures for awarding and reviewing punitive awards in *Haslip* because Alabama's standard of review "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." 499 U.S. at 22. Among other things, the Court noted:

> The Alabama Supreme Court's postverdict review ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages. While punitive damages in Alabama may embrace such factors as the heinousness of the civil wrong, its effect upon the victim, the likelihood of its recurrence, and the extent of the defendant's wrongful gain, *the factfinder must be guided by more than the*

> *defendant's net worth.* Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.

Id. (emphasis added). As Justice Breyer observed in *BMW*, "legal standards need not be precise in order to satisfy this constitutional concern. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior." 517 U.S. at 588 (Breyer, J., concurring).

In direct contradiction to the plain command of these decisions, the Nevada Supreme Court determined that no "workable standard" exists by which to evaluate punitive damages awards, and that the issue is therefore left solely to the "unreviewable discretion of the jury," absent the very narrow—and in the case of large corporate defendants extremely rare—circumstances where the punitive award "would financially destroy or annihilate the defendant." App., *infra*, 10a. Thus, in contrast to Alabama's post-verdict review procedures upheld in *Haslip*, Nevada's "financial annihilation" standard is based *solely* on the defendant's net worth, and as a result, Nevada plaintiffs "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." Such a blinkered and inequitable standard of review cannot satisfy this Court's requirement that States provide meaningful judicial review of punitive damages awards. As Justice O'Connor explained in *TXO*, upholding punitive damages awards where, as here, jury instructions, argument by counsel, and standards of appellate review "invit[e] the jury to redistribute wealth . . . based solely on [a large, corporate defendant's] financial position," 509 U.S. at 489-90, "renders the meaningful appellate review contemplated by *Haslip* [and now *BMW*] illusory" and allows courts "to disregard the post-trial review required by due process at whim or will." *Id.* at 500.

Moreover, the Nevada Supreme Court's "financial annihilation" standard does not even remotely comply with the constitutional analysis mandated by *BMW*. Because the decision below amounts to a wholesale disregard of federal constitutional principles, and places decisions of the Nevada

Supreme Court in stark conflict with this Court's decisions, this Court should grant certiorari. *See Hudson v. Louisiana*, 450 U.S. 40, 42 (1981) (conflict between decision of the highest state court and that of the Supreme Court on matter of federal law is ground for certiorari); *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 14 (1974) (same).[3]

This Court's *BMW* decision mandates that all parties, including large corporations involved in interstate commerce, are entitled to "fair notice" and other guarantees of due process before a State imposes a substantial punitive damages award, even if the punishment "w[ould] not financially destroy or annihilate" the defendant. This Court's review is necessary to restore the due process guarantees that the State of Nevada now denies corporate defendants.

B. The Lower Courts Are In Conflict Regarding Whether The Defendant's Wealth May Be Considered Under *BMW*

Notwithstanding the *BMW* Court's rejection of wealth as a guidepost under the Due Process Clause, lower courts since *BMW* have frequently affirmed large punitive damages awards as constitutional based on the overall wealth of large corporate defendants. In affirming the trial court's judg-

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[3] NEV. REV. STAT. § 42.005(1)(a), which limits punitive awards to three times compensatory damages where compensatory damages are $100,000 or more, cannot excuse the Nevada Supreme Court's abdication of its constitutional responsibilities. The ratio between compensatory and punitive damages was only one of the due process guideposts announced in *BMW*, and the award in this case is unconstitutional for several reasons, including that it was based in large part on Dillard's lawful conduct in other states, that Dillard's conduct was not sufficiently reprehensible to warrant so great a punishment, and that nothing in Nevada law provided Dillard adequate notice that its conduct could result in so severe a punishment.

ment, the Nevada court below specifically stated: "We have previously allowed [reliance upon] nationwide worth when a jury decides punitive damages. Specifically, we have recognized '[t]he wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior.'" App., *infra*, 9a (quoting *Ainsworth*, 104 Nev. at 593, 763 P.2d at 677). Indeed, both the jury in awarding punitive damages in this case, and the Nevada Supreme Court in affirming the award, relied *entirely* on Dillard's "nationwide worth" and its status as a large, out-of-state corporation.

Other courts, unfortunately, have taken a similar approach, invoking the defendant's wealth to trump the constitutional analysis mandated by *BMW*. The Eighth Circuit, for example, upheld a $400,000 punitive damages award under *BMW* in part because "[t]he award of $400,000 is less than one one-thousandth of Southern Union's approximately $500,000,000 net worth." *Morse v. Southern Union Co.*, 174 F.3d 917, 925-26 (8th Cir.), *cert. denied*, 120 S. Ct. 29 (1999). In *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1338-39 (11th Cir.), *cert. denied*, 120 S. Ct. 329 (1999), the Eleventh Circuit upheld a $4.35 million punitive damages award under *BMW*, in part because "[defendant] is a large and extremely wealthy international corporation."

In *Jimenez*, the federal district court upheld a $250 million punitive award under *BMW* against an auto manufacturer in light of evidence that the defendant "had a net worth exceeding $11.5 billion . . . , earned more than $13 billion in profits in the past three years . . . , earned profits of approximately $13 billion just on minivan sales from 1987 through 1995 . . . , and has $6.9 billion in cash on hand." 74 F. Supp. 2d at 578-79. The court concluded that under *BMW* the comparable civil penalties were to be scaled up by a factor of 50,000 to reflect "an average year's profits on minivan sales of approximately $1,500,000,000." *Id.* at 584.

In August 1999, a state trial court in California upheld $1.09 *billion* in punitive damages (reducing the jury's $4.8 billion verdict) against an auto manufacturer under *BMW*,

explicitly based on the defendant's wealth. The court held: "[T]he fair notice requirement has been satisfied under the particular facts of this case .... [D]efendant possessed information of its financial condition, putting it on notice that it might face an award as large as the one in this action." L. 1 at 2-3 (*Anderson v. General Motors Corp.*, No. BC116926 (Cal. Super. Ct., Los Angeles County Aug. 26, 1999)).[4]

Additional examples of this utter frustration of *BMW* through reliance on the defendant's wealth are legion in the federal courts.[5]

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[4] Twelve copies of all documents with "L." cites have been lodged with the Office of the Clerk of the Court.

[5] *See, e.g., Deters v. Equifax Credit Info. Services, Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (wealth is a relevant consideration in determining the size of a punitive damages award); *Greenbaum v. Svenska Handelsbanken*, N.Y., 67 F. Supp. 2d 228, 272 (S.D.N.Y. 1999) (purporting to apply BMW in upholding $1.25 million punitive damages award in light of defendant's stipulated ability to pay the award, observing that "[t]his stipulation qualifies [defendant] for the very highest punitive damages awardable for conduct of its flagrancy"); *Scribner v. Waffle House, Inc.*, 14 F. Supp. 2d 873, 940-46 (N.D. Tex. 1998) (imposing $7.45 million punitive damages award following bench trial, treating "the size of Waffle House" as a separate factor under BMW and observing that Waffle House "had total revenues of $283 million from its company-operated restaurants in the last fiscal year before trial, and the total revenue of its additional 465 'franchise restaurants' was $187 million during the same period. Also, the net income of Waffle House for the last fiscal year before trial was approximately $12 million."), *vacated upon stipulation of parties*, 62 F. Supp. 2d 1186 (N.D. Tex. 1999); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1253 & n.14 (S.D. Fla. 1997) (imposing $137.7 million punitive damages award following bench trial and citing *BMW* as

[Footnote continued on next page]

Other state courts have also been engaging in the same misuse of wealth as a proxy for a proper analysis of constitutional excessiveness under *BMW*. For example, in *Lakin v. Senco Prods., Inc.*, 987 P.2d 463 (Or. 1999), the Oregon Supreme Court upheld a $4 million punitive damages judgment based in part on the wealth of the defendant. Although the court purported to analyze the excessiveness issue under *BMW*, the analysis addressed only the factors enumerated in the state statute authorizing punitive damages, which included "the financial condition of the defendant." Relying on the reasoning of the Oregon Court of Appeals, which observed that "the defendant had a net liquidation value of $82,076,000" and that the award "equals approximately five percent of defendant's net value," the court held that the

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[Footnote continued from previous page]
guidance regarding due process limits, but relying on wealth to establish award: "The record reflects that each MiG [military aircraft] is worth approximately $45 million, and that the Cuban Air Force owns approximately 102 MiGs. The total value of this fleet, which is undoubtedly only a fraction of the Cuban Air Force's total assets, is therefore approximately $4.59 billion. The Court finds that 1% of this total, or $45.9 million, should be assessed against the Cuban Air Force for each of the killings."); *T.B. Proprietary Corp. v. Sposato Builders, Inc.*, 41 U.S.P.Q. 2d 1120 (E.D. Pa. 1996) (upholding $675,000 punitive damages award under *BMW*, noting that "[a] corporate defendant's net worth may be considered in determining the excessiveness of the amount of punitive damages awarded" and that "Toll's gross revenues in 1994 were over $500 million"), *aff'd*, 135 F.3d 766 (3d Cir. 1997); *Wood v. Allstate Ins. Co.*, 1997 WL 602796 (E.D. Pa. Sept. 19, 1997) (upholding $150,000 punitive award with only cursory discussion of BMW because "[t]he Third Circuit has endorsed a ratio of around one percent of a defendant's net worth for a punitive damage award," and the award was "well within the acceptable range" when compared to defendant's worldwide net worth of $13.2 billion) (citing *Dunn v. HOVIC*, 1 F.3d 1371, 1383 (3d Cir. 1993)).

award was not "unconstitutionally excessive." *Id.* at 475-76 (citing *Lakin v. Senco Prods., Inc.*, 144 Or. App. 52, 76-77 (1996)). *See also, e.g., Paracelsus Health Care Corp. v. Willard*, __ So. 2d __, 1999 WL 1000697 (Miss. Nov. 4, 1999), *petition for cert. filed* (Apr. 26, 2000) (No. 99-1719) (upholding award of punitive damages 150 times the size of the compensatory award, noting that, given the defendant's financial condition, the award would not impose "financial hardship"); *Wightman v. Consolidated Rail Corp.*, 715 N.E.2d 546 (Ohio 1999) (affirming award of punitive damages 6,250 times size of compensatory award in part because of defendant's status as a large corporation); *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So. 2d 483 (Fla. 1999) (affirming punitive award more than 15 times greater than compensatory award, in light of Owens-Corning's net worth); *Sierra Club Found. v. Graham*, 72 Cal. App. 4th 1135, 1162, 85 Cal. Rptr. 2d 726, 743 (Cal. Ct. App.) (upholding $2.02 million punitive award where defendant's net worth was $90 million, noting that "the award was more than 2 percent of [defendant's] net worth, far less than the 10 percent cap generally recognized by our courts" and opining that "[t]he *BMW* guidelines are just that—they are guidelines which, if not exactly replicated in a state scheme, do not spell constitutional doom"), *review denied* (Cal. Sept. 29, 1999); *Axen v. American Home Prods. Corp.*, 974 P.2d 224, 241-43 (Or. Ct. App.) (upholding $20 million punitive award purportedly under *BMW*, observing that "[t]here is evidence that AHP's annual profits are such that a smaller award may simply be absorbed as a cost of doing business"), *review denied*, 329 Or. 357, *cert. denied*, 120 S. Ct. 979 (2000).

This approach plainly contradicts *BMW* and conflicts with the approach taken by the other courts that have addressed the wealth issue since *BMW*. These cases generally recognize that a defendant's wealth cannot justify upholding a punitive damages award that is deemed "grossly excessive" when analyzed pursuant to the *BMW* principles and guideposts. *See, e.g., Continental Trend Resources, Inc. v. OXY USA*, 101 F.3d 634, 641 (10th Cir. 1996) ("From the [*BMW*] Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the

basis that it is only one percent of its net worth or a week's corporate profits.").

Numerous other courts have likewise rejected the notion that wealth can sustain a punishment otherwise deemed excessive under *BMW*. *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995) (retired Justice White, sitting by designation) ("a defendant's wealth cannot alone justify a large punitive damages award"); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (Easterbrook, J., sitting by designation) (holding evidence of a defendant's wealth inadmissible under federal law to establish the proper amount of punitive damages in part because, "even when considering punitive damages based on state law, the Supreme Court did not treat the defendant's wealth as relevant" in *BMW*); *Florez v. Delbovo*, 939 F. Supp. 1341, 1348 (N.D. Ill. 1996) ("[I]t is clear that [defendant's] wealth cannot save a punishment that is deemed to be excessive under the *BMW* approach"); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513, 531 (D. Utah 1996) ("Manifestly, wealth alone does not justify imposition of a disproportionately large punitive damage award"); *Parrott v. Carr Chevrolet, Inc.*, 965 P.2d 440, 454 (Or. Ct. App. 1998) ("[A]lthough the wealth of a defendant is a relevant inquiry on the issue of punitive damages, it is not a necessary element, and whether a defendant is financially able to pay an award does not mandate that it should do so") (citations omitted); *VF Corp. v. Wrexham Aviation Corp.*, 686 A.2d 647, 650 (Md. Ct. Spec. App. 1996) ("[A] defendant's wealth cannot be the principal basis for a punitive damage award"), *rev'd on other grounds*, 715 A.2d 188 (Md. 1998).

This disagreement concerning the use of wealth under *BMW* is intolerable and, in and of itself, frustrates *BMW*'s basic principle that citizens are entitled to advance notice of the size of potential monetary punishments.

C. The Wealth Issue Is Important, Substantial, And Recurring

This Court should grant certiorari in this case to make clear that the defendant's nationwide wealth is utterly irrelevant to the *BMW* inquiry. This issue is important and sub-

stantial, recurs frequently, and plainly warrants the Court's review in this case.

There are strong arguments that a defendant's financial status should play no role, at any stage of the proceedings, in deciding the severity of punishment in our system of government. This Court has repeatedly cautioned that introduction of evidence of a defendant's wealth may be unfair and unduly prejudicial to large, nonresident corporate defendants, and may raise special due process problems. *See TXO*, 509 U.S. at 464 ("[an] emphasis on the wealth of the wrongdoer increase[s] the risk that the award may [be] influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident"); *Honda*, 512 U.S. at 432; ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences").

In addition, "[b]asing a decision on income and assets . . . calls into question the courts' commitment to do equal justice to the rich and poor." *Pivot Point*, 932 F. Supp. at 223 (Easterbrook, J., sitting by designation). Punitive damages, of course, "share key characteristics of criminal sanctions" (*Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 281 (1994)), and it is difficult to imagine this Court endorsing the imposition of a harsher criminal sanction against a citizen based on his or her financial status. As the Court stated in *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (per curiam) "A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that . . . those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed." *See, e.g., Robinson v. California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional); *see also Powell v. Texas*, 392 U.S. 514 (1968) (punishment can only be inflicted on the basis of the defendant's wrongful acts or behavior, not on the basis of status); *id* at 543 ("Punishment for a status is particularly obnoxious . . . .") (Black, J., concurring).

Using wealth as a factor in punishing a corporation also is irrational. The wealth of corporations, unlike that of individuals, is not even arguably relevant to punitive damages because "[c]orporate assets finance ongoing operations and are unrelated to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law." *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); II American Law Institute, *Reporters' Study: Enterprise Responsibility for Personal Injury* 253-255 (1991) (measuring the appropriateness of a punitive award based on a corporation's net worth "cannot be justified even by the rationale of economic deterrence, let alone retributive punishment"); *cf. BMW*, 517 U.S. at 591 (Breyer, J., concurring); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268-69 (1981) ("it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality . . . the impact on the individual tortfeasor of this deterrence in the air is at best uncertain"); *Lane v. Hughes Aircraft Co.*, 993 P.2d 388, 402 (Cal. 2000) (Brown, J., concurring) (a defendant's wealth cannot provide an "upper limit" to punitive damages because "even for a large corporation, a relatively modest punitive damage award may be sufficient to induce an end to the offensive conduct").

The defendant's wealth simply has no place in the *BMW* analysis. As Justice Breyer observed in his *BMW* concurrence, the wealth factor is an "open-ended basis for inflating awards when the defendant is wealthy." 517 U.S. at 591. Where a reviewing court infuses its excessiveness review with consideration of a large corporate defendant's nationwide wealth, the wealth factor inevitably obliterates the actual *BMW* guideposts and principles. Indeed, here, the Nevada Supreme Court based its decision *solely* on Dillard's "nationwide worth," and refused even to address the proper constitutional analysis under *BMW*.

Also, as this case demonstrates, reliance on the "nationwide worth" of a corporation flouts *BMW*'s ban on extraterritorial punishment, interferes with the policy choices of other States and the federal government, and imposes undue bur-

dens on interstate commerce, all in violation of both the Due Process Clause and the Commerce Clause. 517 U.S. at 571-72. Dillard's "nationwide worth" is the product of lawful conduct in other States that had absolutely no impact on Nevada consumers. Under *BMW*, Nevada is prohibited from punishing such conduct and the Nevada courts were precluded from considering this conduct—and the economic products of it—in deciding the proper amount of punitive damages and whether the punishment was so grossly excessive that it violated the Due Process Clause. As this Court declared as far back as 1881: "No State can legislate except with reference to its own jurisdiction .... Each State is independent of all the others in this particular." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).

Indeed, Nevada has no more right under the Constitution to calculate punitive awards based on Dillard's profits from sales in other jurisdictions than it does to impose a sales tax on such out-of-state-sales. *See Hunt-Wesson, Inc. v. Franchise Tax Board*, __ U.S. __, 120 S. Ct. 1022 (2000) (invalidating California interest deduction offset provision as constituting an impermissible tax on income outside state's jurisdictional reach); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978). "The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992) (invalidating New Jersey's taxation of gain on out-of-state sale of asset) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)); *see also Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968) (invalidating application of Missouri tax apportionment statute to railroad's rolling stock); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 133-35 (1931) (invalidating application of North Carolina tax apportionment statute to New York manufacturer of leather goods); *see generally* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275 (1999).

Here, the consideration of Dillard's nationwide worth contravened all of these principles, and permitted Beckwith's counsel to whip the jury into a frenzy with inflammatory rhetoric concerning Dillard's "corporate jets," its nationwide activities, and the simple fact that it is a large corporation based outside of Nevada. The Nevada Supreme Court further compounded the impact of these improper considerations by abandoning the constitutional analysis mandated by this Court in *BMW*, and by applying instead a "financial annihilation" standard that places no meaningful constraints on the jury's discretion. Given the important and recurring nature of the problem, and the conflicting, confusing rulings by the lower courts on this issue, the Court should grant certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

May 8, 2000

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APPENDIX

DILLARD DEPARTMENT STORES, INC.,
A Delaware Corporation;
and DILLARD'S NEVADA, INC.,
A Nevada Corporation, Appellants,

v.

DELORIS BECKWITH, Respondent.

No. 31378

Supreme Court Of Nevada

Dec. 13, 1999, Filed

Rehearing Denied Feb. 22, 2000.

John Peter Lee, Ltd., Barney C. Ales and Paul C. Ray, Las Vegas, for Appellants.

Donald J. Campbell & Associates and J. Colby Williams, Las Vegas, for Respondent.

BEFORE THE COURT *EN BANC*.

OPINION

LEAVITT, J.

Deloris Beckwith, sixty-four years of age, was a twenty-five-year employee of Dillard Department Stores (Dillard) and an area sales manager for nineteen years. She injured her back at work and filed a workers' compensation claim. Dillard is a self-insured employer. Beckwith was asked to return to work, but her doctor refused to release her because of her condition. When Beckwith failed to return to work, Dillard filled her job with another manager. Upon her return, Beckwith was demoted to an entry-level sales position with a forty-percent reduction in salary and benefits. She resigned and commenced this action.

FACTS

Beckwith was an exemplary employee of Dillard who had never received an annual review rating of less than "satisfactory" and most of her reviews rated her "very good" or "outstanding." Her salary was $41,000 per year, and she enjoyed

a benefit package that included medical coverage and a retirement plan. Beckwith strained her back at work while attempting to move a large mahogany table. Her injuries rendered her unable to walk upright or without assistance. A doctor recommended by Dillard certified her as temporarily disabled secondary to acute lumbosacral strain. Another doctor referred by Dillard agreed. The store manager requested that Beckwith return to work prior to her release from the doctor, even though the manager knew she had not been released. Beckwith failed to return to work when requested, and another person was given her position. The store manager later informed her by telephone that she had been replaced.

Beckwith returned to Dillard for light duty work approximately a month after the injury. She was assigned an entry-level position, which included document filing. Thereafter, she was asked to leave a weekly department managers' meeting because she no longer served in a management position. All of the other area sales managers and assistant managers observed Beckwith's humiliation as a result of the incident.

Beckwith was ultimately given two choices, resignation or a permanent entry-level sales associate position with a forty-percent cut in wages and benefits. She accepted the demotion because she was her sole support and needed the medical benefits. Beckwith was assigned to the ladies' ready-to-wear division, one of the most difficult departments in which to make daily sales quotas. If entry-level sales associates did not make their daily quotas, they could be docked part of their pay or be fired. After Beckwith began working in sales, the teenage sales associates would laugh at her behind her back, and additionally, other Dillard employees in the store talked about Beckwith's situation and why she was demoted. At one point when Beckwith walked into the employee lounge at lunchtime, the room went silent and people stared at her. Beckwith twice complained to management about the humiliation she was experiencing and its effect on her health. She finally resigned one week before her twenty-fifth year with Dillard.

At the time Beckwith was released to return to work there were two area sales manager positions open for which she was qualified, but management determined she was not eligible for an area sales manager position, a post she held prior to her demotion. She was notified the demotion was because she took time "off for workman's [sic] comp."

Beckwith fell into a depression and was treated by a psychiatrist for a major depressive disorder. She was treated with antidepressant medication and psychotherapy.

After leaving her job, Beckwith filled out applications for employment at several department stores, called friends who worked at different stores to inquire if any positions were open and consulted a friend who owned an employment agency in attempts to find work. She called Sears and J.C. Penney's to see if they had openings and filled out applications. She also filed an application with Neiman-Marcus. Nothing came of these efforts. At trial evidence was presented that most department stores have a policy to promote from within and for that reason, Beckwith would not have a chance to be hired as a manager at any comparable department store.

The jury awarded $424,028 in compensatory damages on the tortious constructive discharge claim and $200,000 on the intentional infliction of emotional distress cause of action. The jury also awarded punitive damages and after reduction of each claim to three times the compensatory damages the punitive damages totaled $1,872,084. The total damages awarded were $2,496,112. The court also awarded attorney's fees in the amount of $518,455 pursuant to NRS 17.115 and NRCP 68.

DISCUSSION

Tortious Constructive Discharge

Employees in Nevada are presumed to be employed "at-will" unless the employee can prove facts legally sufficient to show a contrary agreement was in effect. *Vancheri v. GNLV Corp.*, 105 Nev. 417, 777 P.2d 366 (1989). The at-will rule gives the employer the right to discharge an em-

ployee for any reason, so long as the reason does not violate public policy. *Vancheri* at 421, 777 P.2d at 369; *K Mart Corp. v. Ponsock*, 103 Nev. 39, 47, 732 P.2d 1364, 1369 (1987).

Previously, we have specifically held that "the at-will employment rule is subject to limited exceptions founded upon strong public policy; and the failure of the legislature to enact a statute expressly forbidding retaliatory discharge for filing workmen's compensation claims does not preclude this Court from providing a remedy for what we conclude to be tortious behavior." *Hansen v. Harrah's*, 100 Nev. 60, 63, 675 P.2d 394, 396 (1984).

Dillard claims a private cause of action for tortious discharge for filing a workers' compensation claim no longer exists in Nevada after the legislature, in 1995, passed NRS 616D.030:

> 1. No cause of action may be brought or maintained against an insurer or a third-party administrator who violates any provision of this chapter or chapter 616A, 616B, 616C or 617 of NRS.
>
> 2. The administrative fines provided for in NRS 616B.318 and 616D.120 are the exclusive remedies for any violation of this chapter or chapter 616A, 616B, 616C or 617 of NRS committed by an insurer or a third-party administrator.

We have recognized:

> [R]etaliatory discharge by an employer stemming from the filing of a workmen's compensation claim by an injured employee is actionable in tort. Since both the cause of action and the remedy are governed by the law of torts, there is no basis for administrative relief within the framework of the state industrial insurance system . . . ."

Hansen, 100 Nev. at 64-65, 675 P.2d at 397.

The statutory scheme applies only to the administration of the act. The statutes set forth fines to be paid for violations of

the act, such as not paying claimants properly, or at all. It also provides that a self-insured employer may lose its certification if it violates the workers' compensation statutes. NRS 616D.030, as part of this statutory scheme, does not affect the case law of tortious discharge against public policy.

> [A] tortious constructive discharge is shown to exist upon proof that: (1) the employee's resignation was induced by action and conditions that are violative of public policy; (2) a reasonable person in the employee's position at the time of resignation would have also resigned because of the aggravated and intolerable employment actions and conditions; (3) the employer had actual or constructive knowledge of the intolerable actions and conditions and their impact on the employee; and (4) the situation could have been remedied.

Martin v. Sears, Roebuck and Co., 111 Nev. 923, 926, 899 P.2d 551, 553 (1995) (citing *Brady v. Elixir Industries*, 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324 (Ct. App. 1987)). Here, the jury was properly instructed on the above elements.

We have held that "Nevada's workmen's compensation laws reflect a clear public policy favoring economic security for employees injured while in the course of their employment." *Hansen*, 100 Nev. at 63, 675 P.2d at 396.

Beckwith also requested and received a jury instruction concerning the provisions of NRS 616C.530, which provides that an insurer shall follow certain priorities in returning an injured employee to work, the first priority being to "[r]eturn the injured employee to the job he had before his injury." Dillard complains that the instruction created a strict liability standard and in effect directed a verdict against it.

We disagree. The instruction, which by its terms only applies to operatives of a public or private workers' compensation plan, was offered to demonstrate Nevada's policy with regard to injured workers. The instruction was not offered as an assertion of strict liability or that a violation of NRS

616C.530 is a claim for which a worker may receive monetary damages. Beckwith's claim was that Dillard violated public policy by requesting her to return to work prior to being medically released. Dillard then punished Beckwith for her refusal to return to work against doctor's orders by demoting her. Clearly, the public policy of this state favors "economic security for employees injured while in the course of their employment." We conclude that the failure to follow the priorities set forth in the statute, together with Dillard's improper request that Beckwith return to work against doctor's orders, was a direct violation of that public policy. One of the elements necessary to prove constructive tortious discharge is that the action by the employer was in violation of public policy. The instruction was proper for this purpose. The judgment as to the tortious constructive discharge is affirmed.

Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional distress and (3) actual or proximate causation." *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 92 (1981) (citation omitted). We have also held the "tort of intentional infliction of emotional distress is recognizable in the employment termination context." *Shoen v. Amerco, Inc.*, 111 Nev. 735, 747, 896 P.2d 469, 476 (1995). In the present case, there was substantial evidence presented to support the intentional infliction of emotional distress claim. "[A] jury's verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in light of all the evidence presented." *Frances v. Plaza Pacific Equities*, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993) (citing *Bally's Employees' Credit Union v. Wallen*, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)) (emphasis deleted).

Dillard did not offer Beckwith, a longtime employee, her previous position as an area sales manager when she returned to work after her injury. This refusal occurred despite the

fact that two other area sales manager positions were open for which Beckwith was qualified. She was also forced to take an entry-level position with a forty-percent reduction in salary and was told her demotion was directly related to her claim for workers' compensation. Ultimately fellow employees openly speculated as to the reason for Beckwith's demotion, and her complaints to management that her job situation was having an adverse effect on her health were ignored.

The elements of an intentional infliction of emotional distress claim are supported by the evidence and record. The judgment as to intentional infliction of emotional distress is affirmed.

Compensatory Damages

Dillard asserts no compensatory damages should be allowed because the evidence did not show that Beckwith took steps to mitigate her damages, and her economic expert's figures were calculated on the assumption she would retire at age seventy-five. The jury was given instruction number forty-one, which reads as follows:

> Plaintiff Beckwith has a duty to mitigate her damages, that is an affirmative burden to act to minimize her damages. Defendants had the burden of proving that plaintiff failed to mitigate her damages. To satisfy this burden, defendants must prove that during the time in question (1) there were substantially equivalent jobs available, which plaintiff Beckwith could have obtained, and (2) that plaintiff failed to use reasonable diligence in seeking one
>
> The phrase "substantially equivalent" means employment which affords virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status as the position which plaintiff Beckwith previously held with the defendants.

The second paragraph of the instruction is taken from *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir. 1990). Dillard objected because the phrase "substantially equiva-

lent" was applied in a Title VII federal case. Instead, Dillard suggested the second paragraph should read "she has a duty to seek reasonable alternative employment; the Plaintiff should accept any work which she could perform." This language was taken from *Southern Pacific Transportation Company v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). That case involved a personal injury action under the Federal Employers' Liability Act and was not a tortious constructive discharge case. In Fitzgerald we also said it was "unclear whether any bona fide offers were in fact made, or whether they related to reasonable alternative employment for a man with respondent's disabilities." *Id.*

In a similar wrongful discharge case we approved of an instruction which provided that an employee's duty to mitigate damages included "the seeking and acceptance of alternate employment." *Beales v. Hillhaven, Inc.*, 108 Nev. 96, 101, 825 P.2d 212, 215 (1992). In *Beales* we recognized that "the jury was instructed that *Beales* had the obligation to mitigate her damages by seeking other employment. She testified that she could not find employment in her field once she returned to Reno in 1988. Apparently, the jury believed her." *Beales* at 102, 825 P.2d at 216 (emphasis added). We conclude that the terms "substantial equivalent" and "reasonable alternative" are not so disparate in meaning as to warrant refusal. Thus, the error in the verbiage was harmless.[1]

Here there was ample testimony by Beckwith concerning her efforts to mitigate her damages. She was examined and cross-examined on this point. The jury was properly instructed on Beckwith's duty to mitigate her loss. "The question was one for the jury and beyond the scope of our review." *United Ass'n. Journeymen v. Stine*, 76 Nev. 189, 218, 351 P.2d 965, 980-81 (1960) (citations omitted).

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[1] We note that "trial courts" should refrain from using the instruction given in this case. *Beales* states the proper standard.

Dillard failed to present any expert evidence to counter Beckwith's economic expert concerning her future losses. Once the jury found Beckwith was entitled to damages, "it was entitled to weight [sic] the variables and award . . . the appropriate amount." *Beales* at 102, 825 P.2d at 216. The compensatory damages awarded by the jury are proper and supported by substantial evidence in the record.

Punitive Damages

"A plaintiff is never entitled to punitive damages as a matter of right; their allowance or denial rests entirely in the discretion of the trier of fact." *Ramada Inns v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985). "It is the responsibility of the trial court to determine whether, as a matter of law, the plaintiff has offered substantial evidence of malice in fact to support a punitive damages instruction." *Wickliffe v. Fletcher Jones of Las Vegas*, 99 Nev. 353, 356, 661 P.2d 1295, 1297 (1983) (citations omitted). Punitive damages are limited to three times the compensatory damages, where, as here, compensatory damages are $ 100,000 or more. NRS 42.005(1)(a).

Dillard objected to the trial judge's decision to allow the nationwide worth, rather than just the worth of Dillard's Nevada, Inc., to determine the amount of punitive damages to award. We have previously allowed a nationwide worth when a jury decides punitive damages. Specifically, we have recognized "[t]he wealth of a defendant is directly relevant to the size of an award, which is meant to deter the defendant from repeating his misconduct as well as punish him for his past behavior." *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 593, 763 P.2d 673, 677 (1988) (citing *Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 213, 510 P.2d 876, 878-79 (1973)).

The general rule concerning the award of excessive punitive damages has been previously stated by this court:

> Heretofore, we have recognized the subjective nature of punitive damages and the absence of workable standards by which to evaluate the propriety of such an award. Accordingly, we have allowed

> that determination to rest with the discretion of the trier of the fact unless the evidence introduced at trial shows that the amount awarded by the jury would financially destroy or annihilate the defendant in which event we would attempt an appropriate adjustment of the award.

Hale v. Riverboat Casino, Inc., 100 Nev. 299, 306, 682 P.2d 190, 194 (1984) (citations omitted).

In this case, the trier of fact determined the amount of punitive damages, and the trial court reduced the sum to an amount allowed by the statute. The award will not financially destroy or annihilate Dillard. Therefore, the punitive damage award is affirmed.

Beckwith is entitled to post-judgment interest on the punitive damage award. We recently modified our ruling in Ainsworth concerning post-judgment interest on punitive damages. We held that interest should accrue to compensate a party for the loss of the use of the money awarded in the judgment until paid. See *Wohlers v. Bartgis*, 114 Nev. 1249, 969 P.2d 949 (1998); *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 962 P.2d 596 (1998). Accordingly, Beckwith's punitive damage award shall accrue interest at the legal rate from the date of the judgment on the jury verdict.

Attorney's Fees

Dillard objects to the award of attorney's fees to Beckwith. Prior to trial an offer of settlement was made by Beckwith pursuant to NRS 17.115 and NRCP 68. She agreed to settle the matter for a total of $ 187,000, broken down to $93,500 as to each of the two Dillard entities. The purpose of NRS 17.115 and NRCP 68 is to save time and money for the court system, the parties and the taxpayers. They reward a party who makes a reasonable offer and punish the party who refuses to accept such an offer. *Muije v. A North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990).

"It is within the discretion of the trial court judge to allow

attorney's fees pursuant to Rule 68" and "unless the trial court's exercise of discretion is arbitrary or capricious, this court will not disturb the lower court's ruling on appeal." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).

Dillard claims it litigated its defense in good faith and it was not bad faith for it to reject Beckwith's offer. We have set forth the factors a trial judge must exercise in its discretion regarding the allowance of attorney's fees:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

The trial judge, in a separate hearing, found it was unreasonable to reject such a "rock-bottom" offer given at the beginning of the case before any discovery expense had been incurred. The trial court considered the quality of the representation at trial, the reputation of the lawyers, their hourly rate of billing, the timing and reasonableness of the offer and all of the necessary factors set forth in *Beattie*. The trial judge deducted from the total amount of attorney's fees sought the amount Dillard had previously paid as sanctions for discovery abuses. There was no abuse of discretion on the part of the trial judge, the award of attorney's fees was proper and it is affirmed.

The judgment on the jury verdict for compensatory and punitive damages is affirmed.

ROSE, C.J. YOUNG,. SHEARING, AGOSTI and Becker, JJ., concur.

MAUPIN, J., concurring.

I agree with the result reached by the majority. I write separately to note my disagreement with the majority's affirmation of the instruction containing the language from NRS 616C.530. That provision sets priorities for workers' compensation insurers in their efforts to return injured workers to work. The priorities articulated do not create a legal standard governing an employer's re-assimilation of an injured worker to the work place. I can see no legislative intent to that effect. Thus, the instruction was couched in terms of a specific duty that did not apply to employers. However, because the statutory language did not add a great deal to the standard of recovery that respondent was required to satisfy below, the giving of the statutory instruction was harmless error.

I also wish to emphasize in this separate opinion my view that the enactment of NRS 616D.030 was in no way calculated to overturn our decision in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984), and its progeny.

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DISTRICT COURT

CLARK COUNTY, NEVADA

DELORIS BECKWITH, Plaintiff, vs. DILLARD'S INC., a Delaware Corporation, formerly known as DILLARD DEPARTMENT STORES, INC., Defendant.	CASE NO: A364772 DEPT NO: VII DOCKET: P Hearing Date: October 30, 1999 Hearing Time: 9:00 a.m.

ORDER REGARDING POST-TRIAL MOTIONS

The following post-trial motions came on for hearing before the Honorable Mark Gibbons in Department VII of the Eighth Judicial District Court on October 30, 1997:

1. Defendant's Motion for Judgment Notwithstanding the Verdict;

2. Defendant's Motion to Retax and Settle Costs;

3. Plaintiff's Countermotion for Attorneys' fees; and

4. Defendant's Motion to Quash Subpoenas.

Donald J. Campbell and J. Colby Williams appeared on behalf of the plaintiff, and John Peter Lee, Barney C. Ales, and Paul C. Ray appeared on behalf of defendant Dillard's, Inc. (formerly known as Dillard Department Stores, Inc.); the Court having read and reviewed the motions on file before it, listened to argument of counsel, and being fully advised, enters the following Order:

IT IS HERBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion for Judgment Notwithstanding the Verdict is GRANTED in part, and DENIED in part. Defendant's motion is granted insofar as it seeks to reduce the verdict regarding punitive damages to three times the amount of compensatory damages awarded by the jury. Thus, the punitive damages awarded on plaintiff's claim of Tortious Constructive Discharge in Violation of Public Policy are reduced from $2.8 million to $1,272,080.00 (3 x $424,028.00), and the punitive damages awarded on plaintiff's claim for Intentional Infliction of Emotional Distress are reduced from $1.4 million to $600,00.00 (3 x $200,000.00). Accordingly, the total amount of compensatory and punitive damages awarded to plaintiff is $2,496,112.00. Defendant's motion is denied in all other respects.

IT IS FURTHER ORDERED that Defendant's Motion to Relax and Settle Costs is GRANTED in part, and DENIED in part. Defendant's motion is granted insofar as it seeks to retax costs attributable to Supreme Court Clerk filing fees, parking charges for witnesses, and services rendered by Bruce Evans. The Court finds that these costs are not recoverable under NRS 18.005. After excluding the foregoing items, the Court awards plaintiff $44,670.68 for taxable costs based on her Memorandum of Costs and Disbursements. Defendant's motion is denied in all other respects.

IT IS FURTHER ORDERED that Plaintiff's Countermotion for Attorney's Fees is GRANTED. The Court, after considering the factors enumerated in *Beattie v. Thomas*, 99

Nev. 579, 668 P.2d 268 (1983), finds that plaintiff is entitled to recover her attorney's fees incurred from December 9, 1996, the date plaintiff's offers of judgment to defendants expired. After reducing the foregoing by the amount of attorney's fees previously awarded to plaintiff in this matter, $23,640.00, the Court awards plaintiff $518,455.00 for attorneys' fees.

IT IS FURTHER ORDERED that Defendant's Motion to Quash Subpoenas is GRANTED. While defense counsel does not have to produce its billing records, the Court does order defendant to file an affidavit detailing the hourly rates charged by its attorneys in this matter so that the Court may confirm the reasonableness of the rates charged by plaintiff's attorneys.

IT IS FURTHER ORDERED that plaintiff is awarded prejudgment interest on the principal amount of $200,000.00 beginning from October 14, 1996, the date the complaint was served on Dillard Department Stores, Inc. Additionally, postjudgment interest on the aggregate amount of $3,059,237.68 shall accrue continually hereafter from the date judgment is entered until paid.

IT IS FURTHER ORDERED that as a condition of granting Defendant's Motion to Stay Execution, which was previously submitted to and considered by the Court, defendant shall post a supersedeas bond sufficient to permit full satisfaction of the total judgment ($3,059,237.68), plus two years of postjudgment interest calculated at the current rate of 10.5% ($642,439.76).

DATED this 6 day of November, 1997

/s/
DISTRICT COURT JUDGE

SUBMITTED BY:

DONALD J. CAMPBELL & ASSOCIATES

By /s/
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DELORIS BECK WITH

DISTRICT COURT

CLARK COUNTY, NEVADA

DELORIS BECKWITH, Plaintiff,	
	CASE NO: A364772
	DEPT NO: VII
	DOCKET: P
vs.	
DILLARD'S INC., a Delaware Corporation, formerly known as DILLARD DEPARTMENT STORES, INC., Defendant.	Dates of Trial: 8/25/97 - 9/05/97; 9/15/97 - 9/17/97; and 9/29/97

JUDGMENT

The trial of this case was heard from August 25 through September 5, 1997, and from September 15 through September 17, 1997, and the punitive damages proceedings were heard on September 29, 1997, before this Court and a jury in Department VII, Donald J. Campbell and J. Colby Williams appeared on behalf of the plaintiff, and John Peter Lee and Barney C. Ales appeared on behalf of defendant Dillard's,

Inc. (formerly known as Dillard Department Stores, Inc.). After hearing the evidence, the instructions of the court, and the arguments of eounsel, the jury deliberated and then duly answered the jury verdict form submitted to them and duly rendered a verdict as to the complaint. In accordance with the verdict of the jury, and good cause appearing:

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that:

1(a). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, under her Second Cause of Action (Tortious Constructive Discharge in Violation of Public Policy) against defendant DILLARD'S, INC. (formerly known as DILLARD DEPARTMENT STORES, INC.) in the principal amount of $424,028.00;

(b). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, against defendant DILLARD'S INC. for punitive damages under her Second Cause of Action (Tortious Constructive Discharge in Violation of Public Policy) in the principal amount of $1,72,084.00;

(c). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, under her Fifth Cause of Action (Intentional Infliction of Emotional Distress) against defendant DILLARD'S INC. in the principal amount of $200,00.00; and

(d). Final judgment is entered in favor of the plaintiff, DELORIS BECKWITH, against defendant DILLARD'S INC. for punitive damages under her Fifth Cause of Action (Intentional Infliction of Emotional Distress) in the principal amount of $600,00.00 for a total sum of $2,496,112.00. In addition:

2. Plaintiff is awarded $51,455.00 for attorney's fees;

3. Plaintiff is awarded $44,670.68 for taxable costs; and

4. Plaintiff is awarded prejudgment interest on the principal amount of $200,00.00 beginning from October 14, 1996, the date the complaint was served on Dillard Department Stores, Inc. Additionally, postjudgment interest on the

aggregate amount of $3,059,237.68 shall accrue continually hereafter from the date judgment is entered until paid.

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with NRCP 54(b) this Court expressly determines that there is no just reason for delay in entering final judgment on the complaint and hereby expressly directs that final judgment upon the sums awarded on plaintiff's complaint be entered in favor of the plaintiff and against defendant; and the same is hereby entered.

DATED this 6 day of November, 1997.

/s/
DISTRICT COURT JUDGE

SUBMITTED BY:
DONALD J. CAMPBELL & ASSOCIATES

By /s/
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J. COLBY WILLIAMS, ESQ., #5549
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IN THE SUPREME COURT OF THE
STATE OF NEVADA

DILLARD DEPARTMENT STORES, INC. A DELAWARE CORPORATION; AND DILLARD'S NEVADA, INC., A NEVADA CORPORATION,

Appellants,

vs.

DELORIS BECKWITH,

Respondent.

No. 31378

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c)

It is so ORDERED.

FILED: Feb. 22, 2000

/s/ _____, C.J.
Rose

/s/ _____, J.
Young

/s/ _____, J.
Maupin

/s/ _____, J.
Shearing

/s/ _____, J.
Agosti

/s/ _____, J.
Leavitt

/s/ _____, J.
Becker